UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LEONARD SHERWOOD, et al.	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 02-211-P-H***
	)	
PRISON HEALTH SERVICES, et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON MOTIONS TO STRIKE AND RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants, Prison Health Services ("PHS") and Celia W. Englander, M.D., move for summary judgment on all counts of the plaintiffs' complaint. Defendants' Motion for Summary Judgment, etc. ("Motion") (Docket No. 9). In addition, the plaintiffs have filed a motion to strike portions of the statement of material facts filed by the defendants in support of the motion for summary judgment, Plaintiffs' Motion to Strike Portions of Defendants' Statement of Material Facts ("Plaintiffs' First Motion to Strike") (Docket No. 21), and a motion to strike portions of the defendants' reply memorandum, Plaintiffs' Motion to Strike Portions of Defendants' Reply Memorandum, etc. ("Plaintiffs' Second Motion to Strike") (Docket No. 32), and the defendants have filed two motions to strike, Defendants' Motion to Strike Portions of Affidavit of Deborah Purrington, etc. ("Defendants' First Motion to Strike") (Docket No. 27); Defendants' Motion to Strike Portions of Plaintiffs' Opposing Statement of Material Facts ("Defendants' Second Motion to

Strike") (Docket No. 28). I will first address the motions to strike, as set forth below. I will then discuss my recommendation that the motion for summary judgment be granted in part.

I. Motions to Strike

A. Plaintiffs' First Motion to Strike

The plaintiffs' first motion to strike essentially repeats objections made in the plaintiffs' response to the defendants' statement of material facts. Plaintiffs' First Motion to Strike at 1-2. They ask this court to strike 55 of the 241 paragraphs in the defendants' statement of material facts for one or more of the following reasons: (i) the paragraph "contains multiple factual assertions that preclude the possibility of an admission of the whole;" (ii) the section or sections of the summary judgment record cited in support of the paragraph do not support the assertions made therein; (iii) the section or sections of the summary judgment record cited in support of the paragraph present inadmissible hearsay; (iv) the section or sections of the summary judgment record cited in support of the paragraph do not present the best available evidence on the point; (v) the paragraph presents a legal conclusion rather than a factual assertion; (vi) the individual whose testimony is offered in support of the paragraph lacked personal knowledge of the fact or facts asserted; and/or (vi) the paragraph presents facts that are irrelevant or, in the alternative, the probative value of which is outweighed by the danger of unfair prejudice. *See generally* Plaintiffs' Opposing Statement of Material Facts, etc. ("Plaintiffs' Responsive SMF") (Docket No. 15).

The first of these objections, while making a valid observation about the intent of Local Rule 56, does not present grounds to strike any of the paragraphs to which it is asserted. The plaintiffs were able to identify those portions of each such paragraph which they admitted, denied or qualified. The motion is

denied to the extent made on this basis.[1] Similarly, a motion to strike certain factual assertions pursuant to Fed. R. Evid. 403, on the ground that the probative value of those assertions is outweighed by the danger of unfair prejudice or confusion, is not appropriate in the context of summary judgment, where matters are not presented to a jury and the court does not weigh credibility or resolve disputed issues of material fact, except in extraordinary circumstances not present here. *See, e.g., Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 428 (7th Cir. 2000); *Hines v. Consolidated Rail Corp*., 926 F.2d 262, 274 (3d Cir. 1991). Accordingly, the motion is denied to the extent that it is made on this basis.[2]

The plaintiffs contend, Plaintiffs' Reply Memorandum in Support of Motion to Strike, etc. (Docket No. 30) at 1, that the defendants have not opposed their motion to strike the following paragraphs of the defendants' statement of material facts and that the motion must therefore be granted: 21, 32, 49, 62, 67, 70, 87, 124, 130, 146, 149 and 201. Because the motion to strike some of these paragraphs was based on the "multiple factual assertions" objection discussed above, it may not be granted as to portions of those paragraphs addressed only by that objection. Therefore, the motion is granted as to the following paragraphs or portions thereof: 21 (second sentence only), 32, 49, 62, 67, 70, 87, 124, 130, 146, 149 and 201.

The remaining objections raised by the plaintiffs do not lend themselves to consideration in a manner other than addressing each paragraph individually.

Paragraph 7: The plaintiffs contend that the second sentence is not supported by the citation given to the summary judgment record. Plaintiffs' Responsive SMF ¶ 7. To the contrary, paragraph 5 of the affidavit of Ray Langham, cited by the defendants in support of this sentence, does not set forth any pay

[1] The motion to strike on this basis addresses the following paragraphs of the defendants' statement of material facts: 7, 9, (*continued on next page*)

increase for Morong between the date on which he began employment with PHS and late October 2000, when he became a salaried employee. Affidavit of Ray Langham, Exh. 3 to Defendants' List of Record Citations Submitted with Statement of Undisputed Facts ("Citation List") (submitted with Docket No. 10), ¶ 5. A reasonable inference that Morong did not receive the increase in his hourly rate of pay that he requested in June 2000 may be drawn from this paragraph of the Langham affidavit. The motion to strike the second sentence of paragraph 7 is denied.

Paragraph 12: The plaintiffs contend that the citations provided do not support the factual assertions made, a cited document is hearsay and unauthenticated, another statement is hearsay, and testimony regarding the substance of the contract between PHS and the State of Maine is not admissible because the contract itself must be offered. Plaintiffs' Responsive SMF ¶ 12. The latter contention lacks merit. The testimony at issue is that of Randi Murphy. From all that appears in her affidavit, she is competent to testify concerning the requirements imposed by the contract. Affidavit of Randi Murphy (Exh. 6 to Citation List) ("Murphy Aff.") ¶¶ 1, 4. The plaintiffs have made no attempt to show that her recitation of the contract requirements is incorrect. The motion is accordingly denied as to the second sentence of this paragraph. With respect to the first sentence of the paragraph, the plaintiffs do not challenge the defendants' citation of Exhibit 16 to Morong's deposition, and that exhibit does support the sentence, with the exception of the phrase "and complete 'on call' coverage." Deposition of Douglas M. Morong (Exh. 2 to Citation List) ("Morong Dep."), Exh. 16. Support for that portion of the sentence is found only in Exhibit 16 to the deposition of Joyce Harmon (Exh. 5 to Citation List) ("Harmon Dep."), the other citation given by the defendants, but the defendants do not respond to the plaintiffs' objection to that document. *See*

21, 23, 25, 34, 41, 50-51, 53, 61, 67, 73, 79, 88-89, 95-96, 120, 123, 130, 147, 151, 166, 169, 181, 186, 191, 212, 218, 229.

Defendants' Opposition to Plaintiff's Motion to Strike Portions of Defendants' Statement of Material Facts ("Defendants' SMF Opposition") (Docket No. 26) at 2. Accordingly, the motion to strike is granted only as to that phrase in the first sentence of Paragraph 12.

Paragraph 29: The plaintiffs object to this paragraph on the ground that it states a legal conclusion rather than a fact. Plaintiffs' Responsive SMF ¶ 29. To the contrary, the statement is reasonably characterized as one of fact. The motion to strike paragraph 29 is denied.

Paragraph 31: The plaintiffs object to this paragraph, asserting that the cited references are hearsay and unauthenticated documents. Plaintiffs' Responsive SMF ¶ 31. Again, the defendants do not respond to the plaintiffs' contention that Exhibit 16 to the Harmon deposition, one of the two sources cited in support of this paragraph, requires authentication. With respect to the other citation, the defendants contend that Harmon's deposition testimony is not offered for the truth of the matter asserted but rather to show her state of mind since her actions are alleged to have been illegally retaliatory. Defendants' SMF Opposition at 3. The cited portion of Harmon's deposition testimony supports the entire paragraph, Harmon Dep. at 131, and the defendants' characterization of the purpose for which it is offered is correct. The motion to strike paragraph 31 is denied.

Paragraph 34: The plaintiffs contend that paragraph 4 of Murphy's affidavit, the only citation given by the defendants in support of this paragraph, constitutes hearsay. Plaintiffs' Responsive SMF ¶ 34. The defendants assert that the testimony is not offered for its truth but only to show Murphy's state of mind with respect to the allegation of retaliation. Defendants' SMF Opposition at 3. The fact that Murphy "received complaints about Morong's attendance" is not hearsay. The second sentence of the paragraph would be

[2] The plaintiffs raise this objection only to paragraphs 64 and 65 of the defendants' statement of material facts.

hearsay if offered for its truth — namely, that Morong was not at work when he was supposed to be — but I conclude that the defendants' characterization of the purpose for which it is offered is correct. The motion to strike paragraph 34 is denied.

Paragraph 35: The plaintiffs again contend that Murphy may not testify concerning the terms of the contract between PHS and the State of Maine. Plaintiffs' Responsive SMF ¶ 35. For the reasons already discussed, this argument is not persuasive. The motion to strike paragraph 35 is denied.

Paragraph 37: The plaintiffs object to this paragraph as hearsay. *Id*. ¶ 37. The defendants contend that the paragraph is not offered for its truth but rather "as evidence of Ms. Murphy's personal involvement with Mrs. Harmon on this issue, and her personal knowledge of issues Mrs. Harmon addressed." Defendants' SMF Opposition at 4. In this case, the first sentence of the paragraph can only reasonably be characterized as being offered for its truth, but the affidavit cited in support does show that this information was within the declarant's personal knowledge. Murphy Aff. ¶ 5. The second sentence also sets forth information that was within the declarant's personal knowledge and does not require reliance on the statement of a third person. The motion to strike is denied. I further note that the defendants' purported denial of the paragraph does not address the factual assertions included in the second sentence, which accordingly will be deemed admitted.

Paragraph 38: The plaintiffs raise a hearsay objection to one of the two citations given in support of this paragraph. Plaintiffs' Responsive SMF ¶ 38. The remaining citation adequately supports the paragraph. The motion to strike paragraph 38 is denied.

Paragraph 40: The plaintiffs object to both of the citations given in support of this paragraph as hearsay. *Id*. ¶ 40. The defendants' response is less than clear, but they appear to contend that the information presented in this paragraph is offered to show Murphy's state of mind, and therefore is not

hearsay. Defendants' SMF Opposition at 4-5. Both sentences present hearsay unless offered only to show Murphy's state of mind with respect to the retaliation claim. The information is presented as fact; I conclude that the information does not go to Murphy's state of mind. The motion to strike paragraph 40 is granted.

Paragraph 47: The plaintiffs contend that the Murphy affidavit, the only citation given in support of this paragraph, presents hearsay on this point and that Murphy lacked personal knowledge of the information set forth. Plaintiffs' Responsive SMF ¶ 47. The defendants respond that Murphy has personal knowledge of this information. Defendants' SMF Opposition at 5. This characterization is correct. The motion to strike paragraph 47 is denied.

Paragraph 48: The plaintiffs assert that the citation given in support of this paragraph, the same paragraph of the Murphy affidavit cited in support of paragraph 47, constitutes hearsay and that Murphy may not testify as to information contained in medical records when the records themselves have not been made part of the summary judgment record. Plaintiffs' Responsive SMF ¶ 48. For the reasons already discussed with respect to both of these objections, the motion to strike paragraph 48 is denied.

Paragraph 51: The plaintiffs contend that paragraph 11 of the Murphy affidavit does not support the matter asserted, paragraph 12 of the Murphy affidavit constitutes hearsay, the cited portion of the Harmon deposition constitutes hearsay, the cited portion of the Englander deposition does not support the assertions made, and Murphy and Harmon lack personal knowledge of the matters on which their testimony is offered. *Id*. ¶ 51. The defendants respond only that Murphy had the requisite personal knowledge. Defendants' SMF Opposition at 5. I will therefore address only the citations to her affidavit. Paragraph 11 of that affidavit does not support the assertions in paragraph 51 of the defendants' statement of material facts. Murphy Aff. ¶ 11. Paragraph 12 of that affidavit, however, supports all of the assertions and, in the

context of the entire affidavit, Murphy is shown to have personal knowledge of the matters asserted. Accordingly, the motion to strike paragraph 51 is denied.

Paragraph 52: The plaintiffs object to the first sentence of this paragraph, contending that Murphy's affidavit, the only citation given in support, constitutes hearsay and that Murphy lacks personal knowledge of the matter asserted. Plaintiffs' Responsive SMF ¶ 52. The defendants respond that Murphy "did have personal knowledge of Morong's practices" in this regard. Defendants' SMF Opposition at 5. On this point, the Murphy affidavit, considered as a whole, establishes circumstances that would provide Murphy with such personal knowledge. The motion is accordingly denied as to the first sentence of paragraph 52.

Paragraph 53: The plaintiffs contend that the citations given in support of this paragraph constitute hearsay and that Murphy has no personal knowledge of the matters asserted. Plaintiffs' Responsive SMF ¶ 53. The defendants assert that Murphy had personal knowledge of these matters; they do not respond to the objection concerning Exhibit E to Murphy's affidavit or the deposition testimony of Englander. Looking solely at paragraph 14 of the Murphy affidavit, therefore, I conclude that Murphy had personal knowledge of the matters set forth in the first and third sentences of this paragraph, and the motion is denied as to those sentences. That paragraph of the affidavit does not support the second sentence of paragraph 53, and the motion is granted as to that sentence.

Paragraph 56: The plaintiffs assert that two of the three citations given in support of this paragraph constitute hearsay. *Id*. ¶ 56. They do not object to the citation to paragraph 15 of the Murphy affidavit. The contents of paragraph 56 are fully supported by that paragraph of the affidavit. The motion to strike paragraph 56 is denied.

Paragraph 57: The plaintiffs' objection to this paragraph is identical to their objection to paragraph 56; again, they do not object to the citation to paragraph 15 of the Murphy affidavit. *Id*. ¶ 57. The first

sentence of paragraph 57 is supported by that paragraph of the Murphy affidavit and the motion to strike is accordingly denied as to that sentence. The cited section of Harmon's deposition testimony is not hearsay as to her view of Morong's refusal. Harmon Dep. at 199-200. However, neither that testimony nor the deposition exhibit cited by the defendants establishes that Murphy viewed this refusal as insubordination. Accordingly, the motion is granted as to that portion of the second sentence of paragraph 57 that refers to Murphy's view.

Paragraphs 58-60: The plaintiffs object to all of these paragraphs, which cite the state regulations governing the practice of physician assistants, as statements of law rather than fact. Plaintiffs' SMF ¶¶ 58-60. While that is technically the case, regulations may be cited as authority without including them in a statement of material facts for purposes of summary judgment, and no practical purpose would be served by striking these paragraphs. The motion is denied as to paragraphs 58-60.

Paragraph 61: The plaintiffs object to two of the three citations given in support of this paragraph as hearsay and contend that Harmon, whose deposition testimony and exhibit constitute those two citations, lacked personal knowledge of the matters asserted. Plaintiffs' Responsive SMF ¶ 61. They make no attempt to explain how or why Harmon lacked personal knowledge, and the court will not search through the summary judgment record to determine where there might be support for this conclusory allegation. The defendants respond merely that the third citation, to which the plaintiffs do not object, adequately supports the entire paragraph. Defendants' SMF Opposition at 7. That citation is to Morong's deposition testimony, which supports only a portion of the factual assertions in paragraph 61. Morong Dep. at 215. The portion of Harmon's deposition testimony offered in support of this paragraph is not hearsay, but the information contained in Exhibit 37 to that deposition clearly is hearsay. Accordingly, the motion to strike paragraph 61 is granted only as to the following portions of that paragraph, which are not supported by the

cited portions of Morong's and Harmon's deposition testimony: "PHS did not provide services at that facility and" and "and she did not have time to supervise him there."

Paragraph 63: The plaintiffs object to this paragraph because "the content of Ms. Harmon's report to the Mane Board of Licensure in Medicine and her testimony on that subject constitute inadmissible hearsay" and that she lacks personal knowledge of the subject matter of her report to the Board. Plaintiffs' Responsive SMF ¶ 63. As the defendants point out, this paragraph is not offered to prove the truth of the content of the report but merely to establish that she made such a report. The assertions are not hearsay and Harmon clearly has personal knowledge of the facts set forth. The motion to strike paragraph 63 is denied.

Paragraphs 64-65: The plaintiffs contend that the facts asserted in these paragraphs are irrelevant. *Id*. ¶¶ 64-65. The defendants respond that the facts set forth are relevant to the plaintiffs' claims that their reputations have been damaged by the actions of PHS. The assertions in these paragraphs are irrelevant to any actions taken by PHS that might have affected the reputations of the plaintiffs or their ability to maintain their licenses to practice, and the fact that actions taken by Morong might have had that effect have no bearing on his claims against the defendants. The motion to strike these paragraphs is granted.

Paragraph 73: The plaintiffs object to this paragraph "to the extent that Defendants offer the record citations to establish the truth of statements made by the Board of Licensure in Medicine to Mr. Morong," contending that such statements are hearsay. *Id*. ¶ 73. It is apparent from the face of the paragraph that it is not offered for that purpose. The motion to strike paragraph 73 is denied.

Paragraph 85: The plaintiffs contend that this paragraph presents hearsay. *Id*. ¶ 85. The defendants contend that the information in the paragraph is not offered for the truth of the matter asserted but rather "to show that Ms. Bonney-Corson responded to Morong's complaint in a manner that cannot be

viewed to constitute retaliation." Defendants' SMF Opposition at 8. The interpretation of the facts presented is a matter for argument. The statement is offered for its truth. On the showing made, the motion to strike paragraph 85 is granted.

Paragraph 88: The plaintiffs assert that the citations given do not support the first sentence of this paragraph. Plaintiffs' Responsive SMF ¶ 88. The defendants do not respond to the objection. Defendants' SMF Opposition at 9. The motion to strike the first sentence of this paragraph is granted.

Paragraph 90: The plaintiffs contend that this paragraph is not supported by the given citation to the record. Plaintiffs' Responsive SMF ¶ 90. However, the citation given does support the substance of the paragraph. Deposition of Denise Lord (Exh. 1 to Citation List) at 237. The motion to strike this paragraph is denied.

Paragraph 91: The plaintiffs object to this paragraph on the grounds of hearsay and lack of personal knowledge. Plaintiff's Responsive SMF ¶ 91. The defendants respond that the paragraph, which refers to a letter, is not intended to offer the contents of that letter into evidence and that Harmon's deposition testimony, the only citation given in support of the paragraph, shows that she has personal knowledge of the matters stated. Defendants' SMF Opposition at 9. The defendants' position is correct. The motion to strike paragraph 91 is denied.

Paragraph 92: The plaintiffs' objection is again based on hearsay and lack of personal knowledge. Plaintiffs' Responsive SMF ¶ 92. Again, the paragraph does not purport to offer the contents of the letter mentioned for their truth; it does not purport to offer the contents at all. The paragraph is supported by the citation to Lord's deposition testimony, which is not hearsay and about which she clearly had personal knowledge. The motion to strike paragraph 92 is denied. I note further that the plaintiffs provide no

response to the first sentence of this paragraph, which is supported by the record citation and accordingly deemed admitted.

Paragraph 106: Here, the plaintiffs object to the citation to Morong's own deposition testimony as hearsay. *Id*. ¶ 106. The defendants do not mention this anomaly, but respond that the information in the paragraph is not offered for its truth, asserting that it is offered "to show that PHS responded to Morong's complaint in a manner that does not constitute retaliation." Defendants' SMF Opposition at 10. Addressing the issue as presented by the defendants, I can only conclude that the paragraph is offered for its truth, because the question whether the response was retaliatory can only be resolved if it is accepted that the response was made in the recited terms. Technically, Morong's testimony concerning a third person's statement is hearsay, unless some exception to the hearsay rule applies. On the showing made, the motion to strike paragraph 106 is granted.

Paragraph 110: The plaintiffs make the same hearsay objection to this paragraph as they made to paragraph 106. Plaintiffs' Responsive SMF ¶ 110. The defendants make the same response. Defendants' SMF Opposition at 10. With respect to the second sentence of this paragraph, my analysis is the same as well. The first sentence of the paragraph, however, does not present hearsay. The motion to strike is granted as to the second sentence of paragraph 110.

Paragraph 112: The plaintiffs contend that one of the two citations given by the defendants does not support this paragraph, that it is based on hearsay and that neither of the individuals whose deposition testimony is cited has personal knowledge of the matters about which they testified. Plaintiffs' Responsive SMF ¶ 112. The defendants do not respond to the assertions concerning Harmon's personal knowledge or hearsay. Defendants' SMF Opposition at 10. The cited testimony of Lord supports the assertions in this

paragraph, the deposition testimony demonstrates that she has personal knowledge of these matters, and the testimony cannot reasonably be characterized as hearsay. The motion to strike paragraph 112 is denied.

Paragraph 123: The plaintiffs assert that Exhibit 22 to the deposition of plaintiff Sherwood, one of two citations given in support of this paragraph, is hearsay. Plaintiffs' Responsive SMF 123. The defendants' response concerns Sherwood's personal knowledge, Defendants' SMF Opposition at 10-11, but that is not the object of the plaintiffs' motion. The second sentence of this paragraph is supported by the testimony cited. The first sentence is not supported by either Sherwood's testimony or the cited document. It is thus unnecessary to address the hearsay objection. The motion to strike is granted as to the first sentence of paragraph 123 only.

Paragraph 135: The plaintiffs object to this paragraph on the ground that "the statements attributed to Mr. Sherwood are based on information that he received from other declarants of which he has no personal knowledge." Plaintiffs' Responsive SMF ¶ 135. The defendants respond that the document cited in support of this paragraph consists of Sherwood's statements to the Board of Licensure in Medicine which are admissions against interest, and that the document is not offered for the truth of the matters asserted but rather to demonstrate Sherwood's state of mind at the time. Defendants' SMF Opposition at 11. The substance of this paragraph, which refers only to a small portion of the document cited in support, may appropriately be characterized as an admission against interest under the circumstances of this case. The motion to strike paragraph 135 is therefore denied.

Paragraph 141: The plaintiffs object to this paragraph "to the extent that it is based on inadmissible hearsay." Plaintiffs' Responsive SMF ¶ 141. It is clear on the face of the paragraph and from the cited supporting document that this paragraph does not present hearsay. The motion to strike paragraph 141 is denied.

Paragraph 142: The plaintiffs' objection to this paragraph asserts that it presents hearsay. *Id*. ¶ 142. The defendants respond that it is not offered for the truth of the matter asserted, but rather to demonstrate Cecil Patmon's state of mind with respect to Sherwood's retaliation claim. Defendants' SMF Opposition at 11. As the defendants also point out, *id*., Patmon may testify that he received complaints about Sherwood from the nursing staff without contravening the hearsay rule. However, his report of the substance of those complaints is hearsay, and it does appear to be offered for its truth. The motion to strike paragraph 142 is granted only as to the phrase "that they did not like the way Mr. Sherwood treated them."

Paragraph 145: The plaintiffs contend that the citation given in support of this paragraph presents hearsay. Plaintiffs' Responsive SMF ¶ 145. The defendants respond that it is not offered for the truth of the matter asserted but rather to show that Patmon received complaints about Sherwood's behavior and that such evidence is relevant to Patmon's state of mind. Defendants' SMF Opposition at 11. The fact that Patmon counseled Sherwood is not hearsay; the reason why Patmon did so is relevant, regardless of the question whether the complaints that he had received were true. The paragraph does not present hearsay. The motion to strike paragraph 145 is denied.

Paragraph 147: The plaintiffs object to this paragraph on the ground that the document which is one of the two citations given constitutes hearsay and lacks authentication. Plaintiffs' Responsive SMF ¶ 147. The defendants do not respond to this objection, noting only that the other citation given does not constitute hearsay. Defendants' SMF Opposition at 12. Given the lack of opposition to the motion to strike with respect to the document, I will consider only the cited deposition testimony. That testimony supports only part of paragraph 147. The motion to strike paragraph 147 is granted to the following extent: everything but

the words "Sherwood had overridden an order Dr. Englander had placed in an inmate's chart, and made an editorial comment in the patient's chart that Dr. Englander had not seen the patient" is stricken.

Paragraph 155: The plaintiffs contend that the words "confidential healthcare information" in this paragraph constitute a legal conclusion rather than a matter of fact and ask that they be stricken. Plaintiffs' Responsive SMF ¶ 155. The term at issue represents the deponent's characterization, which may be subject to cross-examination, but which does not represent a forbidden legal conclusion. The motion to strike this portion of paragraph 155 is denied.

Paragraphs 196-97: The plaintiffs assert that the citations given do not support the factual assertions included in these paragraphs. *Id*. ¶¶ 196-97. The defendants concede that the cited testimony does not address equipment but maintain that the remainder of the two paragraphs is adequately supported. Defendants' SMF Opposition at 12. I agree. The motion to strike is granted only as to the words "and equipment" in paragraphs 196 and 197.

Paragraph 205: The plaintiffs contend that the cited portion of the Harmon deposition, one of two citations given, does not support the factual assertions in this paragraph; that the cited testimony is hearsay; and that neither of the cited deponents has personal knowledge of the matters asserted. Plaintiffs' Responsive SMF ¶ 205. The defendants respond only that Lord, the second cited deponent, has personal knowledge of the matters asserted. Defendants' SMF Opposition at 13. Looking only at the cited Lord testimony, therefore, I conclude that the circumstances indicate that the deponent did have personal knowledge. Her testimony does not involve hearsay, and it supports all of the factual assertions in this paragraph. The motion to strike paragraph 205 is denied.

Paragraph 235: The plaintiffs contend that the citation given does not support the second half of this sentence. Plaintiffs' Responsive SMF ¶ 235. The defendants appear to agree. Defendants' SMF

Opposition at 13. Accordingly, the motion to strike that portion of paragraph 235 that follows the word "staff" is granted.

Paragraph 236: The plaintiffs contend that the document cited in support of this paragraph, one of three citations given, constitutes hearsay. Plaintiffs' Responsive SMF ¶ 236. The defendants do not address this argument, discussing only the cited testimony. Defendants' SMF Opposition at 13. The other citations adequately support the factual assertions in this paragraph. The motion to strike paragraph 236 is denied.

B. Defendants' First Motion to Strike

The defendants move to strike fifteen paragraphs of the affidavit of Deborah Purrington (Docket No. 18), submitted in support of the plaintiffs' statement of additional material facts, and the related paragraphs of the plaintiffs' statement of additional material facts. Defendants' First Motion to Strike at 1-10. The defendants present separate arguments for each challenged paragraph and the plaintiffs respond in similar form. Plaintiffs' Objection to Defendants' Motion to Strike Portions of Affidavit of Deborah Purrington ("Plaintiffs' Purrington Opposition") (Docket No. 33). I will address the motion in that format as well.

Paragraph 15: The defendants ask the court to strike all of this paragraph because they contend that Purrington's statement that Dr. Englander was under the influence of alcohol at work is irrelevant, constitutes inadmissible opinion testimony and lacks personal knowledge. Defendants' First Motion to Strike at 1-3. I note first that paragraph 15 of the Purrington affidavit includes many factual assertions other than the challenged statement; it would not be appropriate to strike the entire paragraph on this basis in any event. The plaintiffs respond that Purrington's affidavit establishes her personal knowledge and provides a basis for her statement of opinion; they assert that the opinion is relevant because "Englander's condition at

work amounted to a lack of physician presence and prompted reports by Plaintiffs." Plaintiffs' Purrington Opposition at 2-3. Paragraph 15 of the Purrington affidavit does establish the affiant's personal knowledge and the basis for her opinion, which is not a matter reserved to expert opinion. The assertion that such a condition "amounted to a lack of physician presence" stretches entirely too far in the absence of other factual support, but the challenged statement is relevant insofar as the asserted condition may have prompted the plaintiffs to make the reports which they allege resulted in illegal retaliation. The motion to strike this paragraph of the affidavit and paragraphs 271-73 of the plaintiffs' statement of material facts is denied.

Paragraph 18: The defendants seek to strike each of the sentences in this paragraph on different bases. With respect to the first sentence they contend that Purrington lacks personal knowledge, that "she has failed to lay an appropriate foundation for this testimony" and that the statement "constitutes inadmissible lay witness opinion testimony." Defendants' First Motion to Strike at 3. In response, the plaintiffs rely on the conclusory assertion in the first paragraph of the affidavit to the effect that Purrington has personal knowledge "derived from observation of or participation in the events described." Plaintiffs' Purrington Opposition at 3. However, more evidence of the basis of an affiant's personal knowledge is required to support the first sentence of this paragraph. The fact that Purrington observed Dr. Englander consume alcohol at meetings outside the prison while she was on call, as the second sentence of the paragraph avers, does not necessarily mean that Dr. Englander was "obviously inebriated" when on call away from the facility, as the first sentence of the paragraph asserts. The motion to strike the first sentence of paragraph 18 of the affidavit is granted. The plaintiffs do not respond to the defendants' contention that Purrington lacks personal knowledge to support the third sentence of this paragraph, and the rest of the affidavit does not present evidence of such knowledge. The motion to strike will be granted as to that sentence as well.

The plaintiffs also offer no response to the defendants' contention that there is no evidence that Purrington possess adequate knowledge to support the conclusion expressed in the fourth sentence of this paragraph. I agree, and strike that sentence as well. The motion to strike is denied as to the second sentence of this paragraph. These rulings require that the motion to strike paragraphs 280 and 282 of the plaintiffs' statement of material facts, which are based on the challenged sentences in paragraph 18 of the Purrington affidavit, be granted as well.

Paragraph 19: The defendants challenge this paragraph on the grounds of lack of personal knowledge, lack of foundation, insufficient factual support and improper expert opinion by a lay person. Defendants' First Motion to Strike at 4. The plaintiffs respond that Purrington had personal knowledge of the matters asserted, that she had sufficient education and experience to express the challenged opinions and that facts presented elsewhere in the affidavit support this paragraph. Plaintiffs' Purrington Opposition at 3-4. On the showing made, I conclude that the affidavit demonstrates sufficient personal knowledge to support the paragraph, which does not express an expert opinion. The motion to strike paragraph 19 is denied.

Paragraph 20: The defendants' objection is based on lack of foundation, lack of personal knowledge and hearsay; they also assert that portions of this paragraph express inadmissible expert opinion and legal conclusions. Defendants' First Motion to Strike at 4-5. The plaintiffs do not respond to the legal-conclusion argument. While the first and third sentences of this paragraph do express opinions, the affidavit presents a sufficient basis for them. The remaining sentences of this paragraph do not suffer from any of the infirmities alleged by the defendants. The motion to strike is denied.

Paragraph 21: The defendants base their objection to this paragraph on lack of foundation, lack of personal knowledge and inadmissible expert medical opinion. *Id*. at 5-6. I agree that the first sentence of

this paragraph expresses an opinion that is not adequately supported elsewhere in the affidavit. The second and third sentences are unobjectionable. Striking the first sentence of this paragraph means that the motion to strike paragraph 290 of the plaintiffs' statement of material facts, which repeats that sentence, must be granted. The motion to strike paragraphs 291-92 of the plaintiffs' statement of material facts is denied.

Paragraphs 22-23: The defendants contend that Purrington lacks personal knowledge of the events set forth in these paragraphs, that she lacks the professional qualifications necessary to make her statements of opinion admissible and that the statements rely on hearsay. Defendants' First Motion to Strike at 6-7. The plaintiffs respond that Purrington's personal knowledge of the events described "is expressly affirmed and impliedly confirmed by the content of her statements," that her opinions do not go beyond the scope of her responsibilities as a nurse and that the fact that a document is missing is not hearsay. Plaintiffs' Purrington Opposition at 4-5. I agree that no hearsay is presented in these paragraphs. Purrington's personal knowledge is sufficiently demonstrated in the affidavit and these paragraphs do not express any expert medical opinion beyond the scope of a nurse's practice. The motion to strike paragraphs 22 and 23 and the related paragraphs of the plaintiffs' statement of material facts is denied.

Paragraph 26: The defendants assert that this paragraph expresses an inadmissible legal conclusion and an expert opinion that Purrington is not qualified to express. Defendants' First Motion to Strike at 7. The plaintiffs do not respond to the first assertion and aver that the defendants cannot attack Purrington's "qualifications . . . as a registered nurse" after employing her in that capacity. Plaintiffs' Purrington Opposition at 5. The latter statement is not helpful. The defendants seek to strike paragraph 307 of the plaintiffs' statement of material facts, which corresponds to the first sentence of paragraph 26 of the Purrington affidavit, but not paragraph 308, which corresponds to the second sentence of the affidavit. Defendants' First Motion to Strike at 7. Accordingly, I conclude that they do not attack the second

sentence of this paragraph. The first sentence of this paragraph does present legal conclusions with no corresponding indication of Purrington's familiarity with applicable statutes or regulations and no identification of those statutes or regulations. The defendants' objections are not applicable to the third or fourth sentences of this paragraph. Striking the first sentence of this paragraph means that the motion to strike paragraph 307 of the plaintiffs' statement of material facts must also be granted. The motion to strike paragraph 309 is denied.

Paragraph 27: The defendants contend that the affidavit makes no showing that Purrington has personal knowledge of one of the matters set forth in this paragraph and that she provides no factual support for it. *Id*. at 7. The plaintiffs respond that "[d]efendants cannot rely upon the difficulty of proving a negative to exclude admissible evidence." Plaintiffs' Purrington Opposition at 5. While that response is insufficient, I conclude, on the showing made, that the affidavit sufficiently establishes Purrington's knowledge that PHS took no action on the specific complaints mentioned. The motion to strike this paragraph and paragraphs 312-14 of the plaintiffs' statement of material facts is denied.

Paragraph 28: The defendants contend that the word "frequently" in the first sentence of this paragraph is "conclusory and unsupported" because no dates on which such incidents occurred are provided. They also contend that the affidavit does not show that Purrington had personal knowledge of this point and speculate that her use of the adverb relies on hearsay. Defendants' First Motion to Strike at 7-8. Taken as a whole, the affidavit provides a basis for Purrington's use of the word "frequently." The motion to strike this paragraph and the related paragraphs of the plaintiffs' statement of material facts, two of which do not include the word, is denied.

Paragraph 29: The defendants challenge the words "to nursing staff to use as they saw fit" as lacking personal knowledge and based on hearsay. *Id*. at 8. The plaintiffs retort that the statement at issue

was made by employees of PHS within the scope of their employment and therefore do not constitute hearsay, citing F. R. Evid. 801. Plaintiffs' Purrington Opposition at 5. The phrase does appear to qualify as an admission against interest under Rule 801(d)(2). The paragraph establishes that Purrington obtained this information from Englander and "others at PHS;" no further demonstration of personal knowledge is necessary under the circumstances. The motion to strike this paragraph and the related paragraph of the plaintiffs' statement of material facts is denied.

Paragraph 32: The defendants object to a portion of the third sentence of this paragraph as hearsay. Defendants' First Motion to Strike at 8. The plaintiffs respond that this statement is not offered for its truth but rather "constitutes the context in which . . . defamatory statements" were made. Plaintiffs' Purrington Opposition at 6. The challenged phrase, "Ms. Harmon and Dr. Englander responded to the scrutiny and criticism," is Purrington's characterization of statements made at the meeting she attended. It is not hearsay. The motion to strike this portion of the paragraph and paragraph 331 of the plaintiffs' statement of material facts is denied.

Paragraph 33: The defendants contend that the first sentence of this paragraph is irrelevant and inadmissible opinion testimony and that Purrington lacks personal knowledge of the matter. They contend that the second sentence presents inadmissible opinion testimony and lacks foundation. Finally, they assert that the assertion that statements made by Harmon and Dr. Englander were not true lack foundation and personal knowledge. Defendants' First Motion to Strike at 8-9. The plaintiffs respond that Purrington has personal knowledge of the matters asserted because she was present during the reported events and that her personal knowledge enables her to state that the statements made by Harmon and Dr. Englander were false. Plaintiffs' Purrington Opposition at 6. The first sentence of this paragraph is an acceptable statement of Purrington's personal opinion; however, it is irrelevant to the claims asserted by the plaintiffs. The second

sentence is also a statement of Purrington's personal opinion but it is not inadmissible for that reason; it does not express expert conclusions. Nor does the sentence lack foundation. The third sentence would perhaps be acceptable if it were presented as an expression of Purrington's opinion, but it is presented as fact. Because the truth of the statements at issue is very much in dispute in this case, presenting one possible view as absolute fact goes beyond Purrington's possible personal knowledge. The motion to strike is granted as to the first and third sentences of this paragraph and denied as to the second. Accordingly, the motion to strike paragraphs 335 and 337 of the plaintiffs' statement of material facts is granted and the motion to strike paragraph 336 is denied.

Paragraph 34: The defendants contend that the first sentence in this paragraph presents either an expert opinion or a legal conclusion, neither of which is admissible, and also lacks factual support. Defendants' First Motion to Strike at 9. They argue that the first half of the fifth sentence of this paragraph is not based on personal knowledge. *Id*. Finally, they assert that the entire paragraph should be stricken as irrelevant because "evidence regarding reports Ms. Purrington may have made to PHS representatives . . . are of no relevance to the Plaintiffs' claims." *Id*. at 9-10. The plaintiffs do not respond to the arguments concerning relevance or legal conclusion, contending only that Purrington's statements "are based upon her perceptions and experience as a registered nurse" and returning to their arguments that the defendants cannot "impeach" Purrington when PHS hired her to work as a nurse and that this paragraph somehow requires them to "prove a negative." Plaintiffs' Purrington Opposition at 6-7. Paragraph 34 of the affidavit incorporates by reference other paragraphs of the affidavit that provide ties to the period of time when the plaintiffs were employed by PHS, contrary to the suggestion of the defendants that some or all of the reports mentioned by Purrington may have been made after the plaintiffs resigned, *id*., and thus making the information potentially relevant, as it concerns the same alleged incidents or types of incidents that form the

basis of the plaintiffs' retaliation claims. The first sentence of this paragraph, however, does represent a legal conclusion unsupported by any specification of the laws allegedly violated, and an expert opinion, although the record does not reflect any designation of Purrington as an expert witness. The motion to strike the first sentence of paragraph 34 is granted. The motion to strike paragraph 338 of the plaintiffs' statement of material facts, which repeats this sentence, is also granted. The first half of the fifth sentence of the paragraph is admissible; while it is conceivable that PHS took corrective action on Purrington's complaints without informing her of the fact and in a manner that made it impossible for her to learn that it had done so, such a scenario is so unlikely given the nature of the reports that the defendants' assertion that Purrington lacked personal knowledge on this point goes at most to the weight of her testimony rather than its admissibility. The motion to strike any other portion of this paragraph, and any corresponding paragraphs of the plaintiffs' statement of material facts, is denied.

Paragraph 35: The defendants contend that this paragraph presents irrelevant information because Purrington's resignation occurred one year after the plaintiffs resigned. Defendants' First Motion to Strike at 10. The plaintiffs respond that this paragraph "has relevant background information that will enable a jury to understand and assess other evidence in the case." Plaintiffs' Purrington Opposition at 7. A jury is not involved in the resolution of a motion for summary judgment. The information is irrelevant to consideration of the issues before the court at this point in the proceeding. The motion to strike this paragraph is granted. Paragraph 344 of the plaintiffs' statement of material facts, which is based solely on this paragraph of the Purrington affidavit, is also stricken.

C. Defendants' Second Motion to Strike

The defendants move to strike the plaintiffs' responses to 53 specified paragraphs of their statement of material facts on the ground that those responses "assert new facts, which are neither responsive to nor

relevant to the applicable statements" upon which the plaintiffs "frequently rely" in their memorandum of law in opposition to the motion for summary judgment. Defendants' Second Motion to Strike at 1. They do not identify any pages of the plaintiffs' memorandum of law where such use is made of the challenged responsive paragraphs. The plaintiffs respond that the "[d]efendants neither object to the evidence offered to support the denials and qualifications nor otherwise challenge the truth of the facts asserted" in the challenged responses. Plaintiffs' Objection and Memorandum of Law in Opposition to Defendants' Motion to Strike Portions of Plaintiffs' Opposing Statement of Material Facts (Docket No. 31) at 1. This response misses the point; as the defendants state, Local Rule 56 does not present them with an opportunity to dispute the factual material presented in denials or qualifications of the paragraphs in their initial statement of material facts. However, to do so would be to open the summary judgment process to an indefinite progression of denials of qualifications, denials of denials, and similar responses. The local rule requires factual assertions when a paragraph is denied or qualified. The court will determine whether a particular denial or qualification is actually responsive or relevant; it will not rely on those that are not. It would also be preferable for a party opposing summary judgment to repeat any factual assertions included in its denials or qualifications of any of the paragraphs in the moving party's statement of material facts upon which it will rely to support its argument in the separate statement of material facts contemplated by Local Rule 56. However, the failure to do so cannot provide grounds for striking all such responses. The defendants in this case have employed the appropriate vehicle to attack those responses which they contend are irrelevant and/or not responsive, but in the absence of any citations to the plaintiffs' memorandum of law demonstrating that the challenged responses were in fact relied upon to support the plaintiffs' position, this court will not review each of the 53 paragraphs listed in the defendants' two-page motion for relevance and

responsiveness. A more detailed presentation is required. The defendants' second motion to strike is denied.

D. Plaintiffs' Second Motion to Strike

The plaintiffs move to strike the argument presented at pages 7-8 of the defendants' reply memorandum (Docket No. 24) in support of their motion for summary judgment. Plaintiffs' Second Motion to Strike at 1. They contend that the defendants' argument based on conditional privilege was not made in the motion itself and may not be raised for the first time in a reply memorandum. *Id*. at 1-2. In their initial memorandum of law, the defendants contended that the plaintiffs had presented only inadmissible hearsay evidence in support of their defamation claims and that "[w]ithout the specific context of the statements or the context in which they were made, Defendants' assertion of privilege is premature. However, Defendants do not waive this defense." Motion at 26-30. They also discussed in general terms the common-law privilege that they would assert. *Id*. at 30. Contrary to the plaintiffs' assertion, this presentation does not constitute a "waiver" of the issue. I agree with the defendants, Defendants' Opposition to Plaintiffs' Motion to Strike Portions of Defendants' Reply Memorandum, etc. (Docket No. 34) at 4-5, that their discussion of this defense in their reply memorandum resulted from the presentation of the Purrington affidavit by the plaintiffs in support of their opposition to the motion for summary judgment. Because the plaintiffs did not have an opportunity to respond to this argument after it had been fully presented by the defendants, I granted the plaintiffs' alternative request, Plaintiffs' Second Motion to Strike at 2, for leave to file a surreply memorandum strictly limited to this issue. That memorandum has now been filed with the court. Docket No. 36. The motion to strike is denied.

II. Motion for Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp*., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Factual Background

The following undisputed material facts are appropriately supported in the parties' respective statements of material facts submitted pursuant to this court's Local Rule 56.

From July 1999 to May 31, 2003 PHS provided health services at designated correctional facilities in Maine pursuant to a contract with the Maine Department of Corrections ("DOC"). Defendants' Statement of Material Facts to Which There is No Dispute ("Defendants' SMF") (Docket No. 10) ¶ 1; Plaintiffs' Opposing Statement of Material Facts and Statement of Additional Material Facts, etc. ("Plaintiffs' Responsive SMF") (Docket No. 15) ¶ 1. PHS is in the business of providing health care services at correctional facilities throughout the United States under contracts with governmental entities. Plaintiffs' Statement of Additional Material Facts ("Plaintiffs' SMF") (included in Plaintiffs' Responsive SMF, beginning at page 71) ¶ 252; Defendants' Reply to Plaintiffs' Statement of Additional Material Facts ("Defendants' Responsive SMF") (Docket No. 25) ¶ 252.

Plaintiff Douglas M. Morong is a physician's assistant licensed to practice in the state of Maine. Defendants' SMF ¶ 2; Plaintiffs' Responsive SMF ¶ 2. He was hired by PHS in January 2000 to provide services at the Maine State Prison, Bolduc Correctional Facility, Maine Correctional Institution, Downeast Correctional Center, Bangor Pre-Release Center and Charleston Correctional Facility. *Id.* ¶ 3. The offer of employment was not reduced to writing. *Id.* ¶ 5. Plaintiff Leonard Sherwood applied for a position as a physician's assistant with PHS in April 2000. *Id.* ¶ 114. He was offered a position at the Maine Correctional Center and first began working for PHS in May 2000. *Id.* ¶ 117. When they first began their employment with PHS, Morong was compensated at an hourly rate of $40.87 and Sherwood was compensated at an annual salary of $72,000 for a 40-hour week. *Id.* ¶¶ 4, 115. Morong received life insurance, health, dental and retirement benefits, a continuing medical education allowance and paid vacation time. *Id.* ¶ 4. While an hourly employee, he was paid overtime and received "additional compensation" at a higher hourly rate when he responded to calls during hours when he was not scheduled to work. *Id.* ¶ 6.

Sherwood was offered 10 paid holidays, two weeks of paid vacation and PHS's standard health, dental, life and long and short term disability benefits. *Id*. ¶ 116.

In June 2000 Morong requested a re-evaluation of his pay scale and an increase in his hourly rate to $65. *Id*. ¶ 7. In August 2000 he forwarded to the then-regional vice-president of PHS a proposal that he be paid a base salary of $120,000 per year for 42 hours per week of work, with an additional $100 per hour for work at facilities not included in his proposal and for travel time to such facilities. *Id*. ¶ 8. As of October 24, 2000 Morong was made a salaried employee and was paid $120,000 per year. *Id*. ¶ 11.

Joyce Harmon became the regional manager for PHS in January 2001. *Id*. ¶ 13. Defendant Dr. Celia Englander became Morong's and Sherwood's supervising physician effective January 12, 2001. *Id*. ¶¶ 14, 125. Dr. Englander was and is board certified in internal medicine, geriatric medicine and hematology. *Id*. ¶ 15. A performance evaluation prepared by Dr. Englander dated January 30, 2001 gave Morong an overall rating of "good." *Id*. ¶ 16. Her performance evaluation of the same date for Sherwood gave him an overall rating of "superior." *Id*. ¶ 126. On January 31, 2001 Morong's salary was increased to $4,742.76 bi-weekly. *Id*. ¶ 18. In January 2001 Sherwood received two increases to his bi-weekly salary; one was implemented because he took on hours at another site and the other was an annual increase. *Id*. ¶ 127. This resulted in a bi-weekly salary of $3,077.57. *Id*.

Morong began looking for other employment in January 2001. *Id*. ¶ 17. By letter dated March 2, 2001 he provided Harmon with a two-week notice that he was discontinuing his service at Downeast Correctional Facility. *Id*. ¶¶ 21-22. Morong's salary was decreased soon thereafter. *Id*. ¶ 23. On March 4, 2001 Morong requested that he be allowed to take a paid vacation from March 12 to March 16, 2001; this request was denied. *Id*. ¶ 25. Randi Murphy, the PHS health services administrator at the Maine State

Prison, was required to review and approve bi-weekly time sheets submitted by Morong. *Id*. ¶¶ 34, 39. Murphy revised Morong's time sheets on occasion. *Id*. ¶ 41.

At times it would be necessary for PHS health care provides to refer inmates to outside health care providers or specialists for treatment. *Id*. ¶ 50. PHS required completion of an "Outpatient Referral Request Form" by health care providers for such referrals. *Id*. The form had to be approved by the medical director. *Id*. Morong made frequent requests to refer inmates to outside consultants or health care providers, a number of which requests were ultimately rejected by Dr. Englander. *Id*. ¶ 51. When Morong's recommendation was rejected by Dr. Englander, inmates would become upset. *Id*. ¶ 52. Murphy asked Morong to consult with Dr. Englander before completing the forms. *Id*. ¶ 53. Morong refused to discuss his views regarding the need for outside medical consultation or treatment with Dr. Englander before completing the referral request forms. *Id*. ¶ 56. Harmon viewed this refusal as insubordination. *Id*. ¶ 57.

Physicians' assistants may perform medical activities only under the supervision of a physician, who is responsible for overseeing and evaluating the physicians' assistant's performance. *Id*. ¶ 58. Physicians' assistants and their primary supervising physicians must have a current plan of supervision on file in the practice setting. *Id*. ¶ 59. Physicians' assistants must notify the Board of Medicine when they change supervising physicians. *Id*. In order to practice as a physician's assistant, an individual must have a license and a certificate of registration. *Id*. ¶ 60. In order to obtain the certificate a physician's assistant must submit a statement from the supervising physician agreeing to provide supervision. *Id*. Before resigning from his position with PHS, Morong asked Dr. Englander to sign a plan of supervision for him at the Hancock County jail; she declined to do so. *Id*. ¶ 61. Harmon reported Morong's use of Dr. Englander's

signature stamp on the plan of supervision posted at the Hancock County jail to the Maine Board of Licensure in Medicine in a letter dated April 25, 2001. *Id*. ¶ 63.

In May 2000 the PHS physician who had been the supervising physician for Morong left his employment with PHS. *Id*. ¶ 66. New paperwork therefore had to be filed with the appropriate licensing board, notifying the board of the new supervising physician and plan of supervision. *Id*. A physician was always designated to supervise Morong while he was working for PHS. *Id*. ¶ 68. On February 12, 2001 the Maine Board of Licensure in Medicine notified Morong that it had issued a complaint against him alleging unprofessional conduct because it had learned that he may have been practicing without a supervising physician during his employment with PHS. *Id*. ¶ 69. PHS forwarded a letter to the Board on behalf of Morong explaining what had happened with respect to the failure to file appropriate paperwork regarding plans of supervision. *Id*. ¶ 72. Morong responded to the Board in a letter dated March 10, 2001 in which he stated that he had been advised by the Board of Medicine that that Board would forward the paperwork PHS had filed to the Osteopathic Board. *Id*. ¶ 73. The complaint was dismissed and no disciplinary action was taken. *Id*. ¶ 75.

Around March 2001 Morong became disillusioned with PHS's corporate structure, his co-employees and the "medical integrity" of PHS and the people with whom he worked. *Id*. ¶ 76. Morong resigned from PHS as of April 1, 2001. *Id*. ¶ 78. He is now part owner of a business and receives a weekly salary, three weeks of every four, of $1,572. *Id*. ¶¶ 80-81.

Morong sent copies of his letter of resignation to the Maine Board of Licensure in Medicine, the Department of Corrections and others. *Id*. ¶ 88. Denise Lord, Associate Commissioner of the Department of Corrections, contacted Harmon, to whom the resignation letter was addressed, after receiving a copy of the letter, to discuss allegations made in the letter. *Id*. ¶¶ 88, 90. Harmon discussed Morong's allegations

with Murphy and Dr. Englander and sent Lord a letter summarizing Dr. Englander's responses to them. *Id.* ¶ 91. The information provided in this letter satisfied Lord's concerns about Morong's allegations; she took no further action. *Id*. ¶ 92.

After receiving Morong's letter, the Maine Board of Licensure in Medicine advised Dr. Englander that it had voted to issue a complaint against her based on the allegations in the letter. *Id*. ¶ 93. After Dr. Englander submitted a written response to the complaint and attended an informal conference with the Board, the complaint was dismissed. *Id*. ¶ 94. At some point in 2001 Morong filed a charge against PHS, Harmon and Dr. Englander with the Maine Human Rights Commission alleging violation of the Maine Whistleblowers Protection Act. *Id*. ¶ 113.

During September and October 2000 inmates filed five complaints against Sherwood with the Maine Board of Licensure in Medicine. *Id*. ¶ 119. Sherwood's written responses included his home address. *Id*. ¶ 122. The Board provided copies of these responses to the inmates who had filed complaints against Sherwood. *Id*. The Board issued a letter of guidance to Sherwood noting that there was a common basis for the patients' complaints and that the cases were not well-documented in the patient charts. *Id*. ¶ 123.

Additional compensation forms were submitted to the PHS payroll department to document extra work performed by employees for which additional compensation was paid. *Id*. ¶ 128. An additional compensation form would be filled out, for example, if Sherwood was called in for an emergency, off hours, and Sherwood would receive additional compensation for the time involved. *Id*. PHS has no records indicating that any additional compensation forms were submitted, or any requests for additional compensation were made, by or on behalf of Sherwood after January 3, 2001. *Id*. ¶ 129.

On February 12, 2001 the Maine Board of Licensure in Medicine notified Sherwood that it had filed a complaint against him because it had learned that he may have been practicing without a supervising physician while he was employed by PHS. *Id*. ¶ 131. In an interview with an investigator for the Board on December 28, 2000 Sherwood stated: "[T]he paperwork was supposed to go to the D.O. Board, but it went to the M.D. Board. I wasn't licensed with the D.O. Board, so then they came up with Dr. Berry. Also the other P.A. up north is supposed to be covered by Berry, Doug Morong. Both Doug Morong and I though[t] we were covered first by Charkowick, and then Berry. But, neither Doug nor I received the little white piece of paper." *Id*. ¶ 132. Sherwood responded to the Board complaint on February 19, 2001 stating that the Board of Medicine created a hostile work environment for him during the months of November and December 2000 and that his health and safety, and that of his family, were jeopardized by the Board's lack of understanding about the correctional system. *Id*. ¶ 133. The letter also stated that the hostile work environment prompted him to look for work at several other places as early as November or December 2000. *Id*. ¶ 134. The letter also questioned why the Board held his licensing paperwork that should have been forwarded to the Osteopathic Board of Medicine. *Id*. ¶ 135.

Sherwood never practiced without an attending physician while he was employed by PHS. *Id*. ¶ 137. PHS forwarded a letter to the Board of Medicine on behalf of Sherwood explaining what had happened with respect to the failure to file appropriate paperwork with the Board in May or June of 2000. *Id*. ¶ 139. The Board of Medicine held an informal conference on August 14, 2001 regarding its concern about the failure to file plans of supervision in May or June 2000. *Id*. ¶ 140. Sherwood and Morong attended. *Id*. The complaint was dismissed. *Id*.

Sherwood crossed out an order that Dr. Englander had written in a patient's chart and made an editorial comment in the chart. *Id*. ¶ 148. Sherwood wrote a memorandum dated March 30, 2001 that

questioned Dr. Englander's practices and clinical judgment. *Id*. ¶ 150. On March 1, 2001 Sherwood sent a letter to several entities complaining that the Board of Medicine had sent correspondence containing his home address to inmates, that practitioners outside the correctional setting were writing prescriptions for inmates and that new inmates were given Oxycontin for shoulder pain. *Id*. ¶¶ 151-53. The letter included as attachments documents containing confidential health care information identifying inmates by name. *Id*. ¶ 155. Copies of the letter and attachments were forwarded to Lord by the Board of Licensure. *Id*. ¶ 156. Lord was concerned about the fact that Sherwood had apparently distributed confidential patient information without obtaining authorization from the patients. *Id*. She contacted Harmon to express her concern and advised Harmon to remind PHS employees not to reveal medical information about prisoners. *Id*. ¶ 157. In late March 2001 Harmon asked Sherwood to meet with her, Dr. Englander and Cecil Patmon, then PHS's health service administrator at the Windham facility. *Id*. ¶ 158; Plaintiffs' SMF ¶ 265; Defendants' Responsive SMF ¶ 265.

Sherwood submitted a letter of resignation to PHS on April 15, 2001 giving two weeks notice. Defendants' SMF ¶¶ 162-63; Plaintiffs' Responsive SMF ¶¶ 162-63. He was told not to return to the facility that day, and his last day of work was April 15, 2001. *Id*. ¶ 163. Sherwood was compensated for the two weeks. *Id*. ¶ 165. Lord received Sherwood's letter of resignation, which she viewed as raising personal rather than professional issues. *Id*. ¶ 167. She did not direct an investigation into the issues raised in Sherwood's letter. *Id*. ¶ 168. Following his resignation Sherwood complained to Harmon that PHS had not paid him all the wages that he was owed. *Id*. ¶ 171. Harmon informed Sherwood in a letter dated May 16, 2001 that he was correct and would be paid what he claimed he was owed. *Id*. ¶¶ 172-73.

Sherwood had begun looking for another job as early as November or December 2000. *Id.* ¶ 176. He currently works as a physician's assistant at Maine Heart Surgical Associates in Portland, Maine. *Id.* ¶ 178. He also works at Mercy Hospital in the emergency department on a per diem basis. *Id.* ¶ 180.

Sherwood claims that he complained to PHS employees (i) as early as October 2000 about the practice of discontinuing medications without seeing patients and (ii) in June 2000 that Dr. Englander routinely denied his requests to refer inmates to outsider providers for treatment. *Id.* ¶¶ 188, 191. In the summer of 2000 Sherwood complained to the Board of Nursing that PHS-employed nurses were being asked to work outside the scope of their licenses. *Id.* ¶ 198. Sherwood claims that in the fall of 2000 he complained to the Board of Pharmacy regarding unlicensed pharmacists working in the state of Maine. *Id.* ¶ 202. Sherwood invited representatives of the Department of Corrections and pharmacy inspectors to come to the Maine Correctional Center to observe the way medications were stored. *Id.* ¶ 207. No representative of PHS reprimanded Sherwood for doing this. *Id.* ¶ 208.

During the summer of 2001 Attorney General Rowe and Assistant Attorney General Ruth McNiff met with Morong and Sherwood for four hours to discuss their complaints regarding the medical care provided to inmates by PHS. *Id.* ¶ 210. To date, the attorney general's office has not acted on the complaints; no hearings have been scheduled. *Id.* ¶ 212. Sherwood and Morong addressed the Board of Medicine on August 24, 2001 with the concerns they had raised with the attorney general. *Id.* ¶¶ 213-14. The Board of Medicine has not taken any disciplinary action against PHS or Dr. Englander regarding the issues raised by Morong and Sherwood during this meeting. *Id.* ¶ 215.

At the time Sherwood and Morong ended their employment relationship with PHS, PHS was under pressure by inmates and their civil rights advocates, including the Maine Civil Liberties Union and Maine Equal Justice Partners, for failing to provide adequate medical care. Plaintiffs' SMF ¶ 326; Defendants'

Responsive SMF ¶ 326. The advocates threatened a class action lawsuit against the State of Maine for violation of prisoners' civil rights. *Id*. ¶ 327. These threats led to meetings between PHS and representatives of the Maine Department of Corrections. *Id*. ¶ 328. Purrington attending these meetings, along with Harmon, Dr. Englander and three representatives of the Department of Corrections. *Id*. ¶¶ 329-30.

C. Discussion

The complaint alleges violation of the Maine Whistleblowers Protection Act, 26 M.R.S.A. § 831 *et seq*. (Count I); defamation (Count II); negligent misrepresentation (Count III); fraud (Count IV); negligence (Count V); breach of contract (Count VI); and violation of 26 M.R.S.A.§ 626 (Count VII). The defendants seek summary judgment on each count, on various grounds.

1. The Whistleblowers Protection Act. Count I of the complaint alleges that the defendants violated the Maine Whistleblowers Protection Act, 26 M.R.S.A. § 831 *et seq*., by constructively discharging and otherwise discriminating against them for complaints that they made to PHS and public bodies. Complaint ¶¶ 55-60. The plaintiffs allege that the following two subsections of the governing statute were violated:

> No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because:
>
> **A.** The employee, acting in good faith, . . . reports orally or in writing to the employer or a public body what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States;
>
> **B.** The employee, acting in good faith, . . . reports to the employer or a public body, orally or in writing, what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual.

26 M.R.S.A. § 833(1). The defendants contend that the plaintiffs cannot establish a *prima facie* case on these claims, and that, in any event, Englander cannot be individually liable on these claims. Motion at 4-25.

The latter contention is correct, and Englander is entitled to summary judgment on Count I. A claim against a supervisor as an individual does not lie under the Maine Human Rights Act. *Gough v. Eastern Maine Dev. Corp.*, 172 F. Supp. 221, 223-27 (D. Me. 2201). The Whistleblowers Protection Act is a provision of the Maine Human Rights Act. *Id*. at 226. The plaintiffs argue at length that this court's interpretation of Maine law is incorrect on this point, Plaintiffs' Objection to Defendants' Motion for Summary Judgment, etc. ("Opposition") (Docket No. 14) at 19-23, but they offer no new argument or reason why this court should change its current position.

To establish a *prima facie* case of retaliation against PHS, each of the plaintiffs must show that (i) he engaged in conduct that was protected under the Whistleblowers Protection Act; (ii) he suffered an adverse employment action; and (3) a causal connection existed between the protected conduct and the adverse action. *Bishop v. Bell Atl. Corp*., 143 F.Supp.2d 59, 62 (D. Me. 2001).

> An adverse employment action is any type of discrimination "with respect to hire, tenure, promotion, transfer, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment." 5 M.R.S.A. § 4572(1)(A). The First Circuit has noted that adverse employment actions include a variety of types of conduct, such as "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees." *Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47 (1st Cir. 1998).
>
> Several types of circumstantial evidence can demonstrate a causal link between the protected act and the adverse act, such as evidence of differential treatment in the workplace, temporal proximity between the protected act and the adverse act, statistical evidence showing disparate treatment, and comments by the employer which intimate a retaliatory mindset. *See Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 828 (1st Cir. 1991). Also, if an employer changes how it treats its employee after performing the protected action, that can reveal a causal

> connection. *See Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 51 (1st Cir. 1999).

Id. at 62-63. If the employee makes such a showing, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the adverse job action. *Parks v. City of Brewer*, 56 F.Supp.2d 89, 102 (D. Me. 1999). "The employee nevertheless will prevail if he demonstrates that the proffered reason is pretextual." *Id*. PHS contends that neither plaintiff can establish any of the three necessary elements of his claim.

i. Protected Activity

PHS contends that the plaintiffs cannot establish this element because "[m]any of the conditions they claim they complained of reflect an exercise of medical judgment" and as such "are neither violations of law or rules nor ongoing conditions or practices that one could reasonably believe pose a health or safety risk." Motion at 6. It argues that other alleged concerns reported by the plaintiffs — presumably all of the remaining concerns, since PHS makes no additional arguments — "raise issues regarding the accuracy of PHS' administrative reporting methods and/or questions regarding compliance with contract provisions," which one could not reasonably believe constitute violations of law or health or safety risks. *Id*. at 7.

The plaintiffs respond with an extensive litany of alleged practices, omissions and actions by PHS and Englander which they present as reportable issues or events. Opposition at 6-11. They contend that their challenges "were directed not so much against 'medical judgment' as against the failure even to exercise any medical judgment." *Id*. at 11. They also argue that they had reason to believe that some of the actions of which they complained violated rules and regulations, but they do not identify any such rules or regulations. *Id*. at 12-13. This oversight makes it impossible for the court to determine whether the plaintiffs have presented a *prima facie* case on the first element of their state-law whistleblower claim.

Because all three elements must be established, and I conclude as set forth below that the plaintiffs have not done so with respect to one of the remaining elements, it is not necessary to address this element further under the circumstances.[3]

ii. Adverse Employment Action

The plaintiffs contend that the following constituted adverse employment actions sufficient to establish the second element of their claim: their constructive discharges; denial of additional compensation to Sherwood for off-hours work between January and March 2001; and denial of Morong's request for vacation, reduction of his vacation benefits, alteration of his timesheets and decreasing his salary by 20% when his workload dropped by 12%. Opposition at 13-15. PHS argues that the plaintiffs "cannot satisfy the stringent standard for a constructive discharge claim," Motion at 8, and responds to each of the other claims independently, *id*. at 12-24, Defendants' Reply to Plaintiffs' Objections to Defendants' Motion for Summary Judgment ("Reply") (Docket No. 24) at 2-6.

> To demonstrate constructive discharge in the First Circuit, the evidence must support a finding that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. This standard is an objective one and thus requires an inquiry into the reasonable state of mind of the person experiencing the new conditions. A claim of constructive discharge cannot stand on an unreasonable reaction to one's work environment or to a change in job responsibilities.
>
> The Court may consider several factors when assessing a constructive discharge claim: exposure to new conditions which are humiliating or demeaning; demotion or reduction in pay; and direct or circumstantial evidence of the employer's discriminatory animus. Other relevant considerations include: suggestions by the employer that the employee resign; confrontations initiated by

[3] The plaintiffs also contend that, because the contract between PHS and the Department of Corrections involved the provision of health care services, "a violation of contractual provisions necessarily implicates issues of health and safety," making their reports of contract violations protected activity under the whistleblower statute. Opposition at 12. This conclusory argument sweeps far too broadly. Many conceivable violations of such a contract would not deal with the health or safety of inmates at all.

> the employer regarding the employee's alleged performance deficiencies; and the employee's attempts to mitigate the situation prior to resignation.

Dudley v. Augusta Sch. Dep't, 23 F.Supp.2d 85, 90 (D. Me. 1998) (citations and internal quotation marks omitted). This court has also interpreted the First Circuit's rulings on constructive discharge as follows:

> "Constructive discharge" is a label for treatment so hostile or degrading that no reasonable employee would tolerate continuing in the position; or working conditions so onerous, abusive, or unpleasant that a reasonable person in the employee's position would have felt compelled to resign; or so difficult or unpleasant that a reasonable person in her shoes would have felt compelled to resign; or so unpleasant that staying on the job while seeking redress would have been intolerable.

Leavitt v. Wal-Mart Stores, Inc., 238 F.Supp.2d 313. 316 (D. Me. 2003) (citations and internal punctuation omitted), *vacated on other grounds* 2003 WL 22016287 (1st Cir. Aug. 27, 2003). The parties agree that to be an adverse employment action, a term that includes constructive discharge, *Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 612-13 (1st Cir. 2000), "an action must materially change the conditions of plaintiffs' employ," *Gu v. Boston Police Dep't*, 312 F.3d 6, 14 (1st Cir. 2002); Motion at 9; Opposition at 15.

PHS contends that the defendants are unable to demonstrate any material change in their working conditions with respect to the events and practices that they contend compelled them to resign; rather, those events, conditions and practices existed throughout the time when they were employed by PHS. Motion at 10-12. The plaintiffs do not respond directly to this argument but assert that their "[e]fforts to reform PHS went unheeded and only resulted in more abuse." Opposition at 14. The only evidence of "more abuse" discussed by the plaintiffs is a meeting attended by Sherwood, Harmon, Patmon and Englander after Sherwood sent a letter to state officials in March 2001 "to report violations and unsafe practices." *Id*.

According to Sherwood, he was told at this meeting that he was to "shut up," and was not to "refer any more complaints outside the facility." Defendants' SMF ¶¶ 151, 156, 158; Plaintiffs' Responsive SMF ¶¶ 151, 156, 158-59, 186.[4] As PHS points out, Reply at 4, the plaintiffs have made no showing that this meeting or these remarks led to any material change in Sherwood's working conditions. The plaintiffs also assert that "[a] reasonable jury could conclude that PHS' refusal to take corrective action itself constitutes retaliation under the facts of this case," Opposition at 17, but that argument also fails to identify any material changes in either plaintiff's working conditions caused by such a "refusal." For all that appears in the summary judgment record, the practices and conditions of which the plaintiffs complained remained the same after they complained. Even if the plaintiffs mean to argue that the practices and conditions of which they began to complain, some of which, from all that appears in the summary judgment record, were present from the beginning of their employment with PHS, caused their constructive discharge regardless of the fact that they remained unchanged throughout their respective periods of employment, Morong was employed for approximately 15 months before he resigned, Defendants' SMF ¶¶ 3, 78; Plaintiffs' Responsive SMF ¶¶ 3, 78; and Sherwood was employed for approximately one year, *id*. ¶¶ 117, 162-63. The passage of such significant periods of time is inconsistent with the existence of working conditions so intolerable that a reasonable person in the position of either plaintiff would have been compelled to resign when they did. With respect to the claim of constructive discharge as an adverse employment action for purposes of the whistleblower retaliation claim, therefore, the plaintiffs have failed to meet their evidentiary burden on summary judgment

[4] The plaintiffs cite their denials of certain paragraphs of the defendants' statement of material facts in support of their argument on this point. Opposition at 14. When additional facts are to be used affirmatively in this fashion, the better practice would be to include them in the responding party's statement of additional material facts as well as including them in the responses to the moving party's statement.

Sherwood offers evidence of only one other alleged adverse employment action, contending that he "was . . . entitled to but did not receive additional compensation for reporting to the facility off-hours for the period January through March 2001." Opposition at 15. In support of this assertion he cites only the plaintiffs' response to paragraph 128 of the defendants' statement of material facts, a qualification that in turn cites pages 203-07of Sherwood's deposition. Plaintiffs' Responsive SMF ¶128. In that testimony, Sherwood said that he was called in four times during those months and should have been paid $100 per hour but was not. Deposition of Leonard V. Sherwood, III (Exh. 9 to List of Citations) at 203-07. He testified that he recorded these visits on "pay stubs." *Id*. at 204. A loss of pay may be an adverse employment action. *See, e.g., Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 25 (1st Cir. 2002). PHS contends in response that Sherwood's testimony on this point is "conclusory and unsupported," particularly because he has not produced evidence of the specific days for which he claims this compensation; and that this testimony is "refuted" by PHS's submitted evidence to the effect that it has no documentation supporting Sherwood's claim. Reply at 6. Both of the defendant's arguments go to the weight of Sherwood's testimony rather than its admissibility; PHS's evidence on this point merely demonstrates that the material facts with respect to this issue are disputed. While the amount of money involved appears to be relatively small, no argument has been made suggesting that a withholding of the amount at issue is *de minimis* and therefore simply cannot constitute an adverse employment action for the purposes of the whistleblower statute. On the showing made, Sherwood has satisfied the second element of the test.

The plaintiffs offer more evidence with respect to Morong on this issue: the alleged denial of his request for vacation time, reduction of his vacation benefits, alteration of his timesheets and decrease in his salary. Opposition at 15. In the responses to certain paragraphs of the defendants' statement of material

facts that are the sole citations given in support of their argument, the plaintiffs contend that the reduction from four to two weeks vacation took place "after [Morong's] complaints about the denial of patient referrals," Plaintiffs' Responsive SMF ¶ 27, as did the decrease in his salary, *id*. at 23.[5] The alteration of his time sheets apparently took place in early March 2001. Defendants' SMF ¶ 44; Plaintiffs' Responsive SMF ¶ 44. The plaintiffs do not suggest what if any event precipitated this alleged retaliation. Finally, the only paragraph of the plaintiffs' responsive statement of material facts cited in support of their assertion that Morong's request for vacation time was denied is paragraph 32. Opposition at 15. That paragraph of the defendants' statement of material facts was stricken on the plaintiffs' motion, *see* page 3 above, and the plaintiffs accordingly may not rely on their qualification of that paragraph. I will not consider the vacation request further.

PHS characterizes the alleged reduction in Morong's allotted vacation time as a "misunderstanding," Reply at 5, but that merely emphasizes the existence of a factual dispute. PHS describes the salary reduction as "commensurate with Morong's own request to cease working at the Downeast Correctional Center," *id*., but again that characterization does not eliminate the factual dispute between the parties about the appropriate amount of any such reduction. PHS cites paragraph 23 of the defendants' statement of material facts in support of its assertion that Morong agreed to this reduction, *id*., but the plaintiffs' qualification response may not reasonably be interpreted as admitting such an agreement, Plaintiffs' Responsive SMF ¶ 23.

[5] PHS devotes considerable effort to arguing that its policy requiring Morong to discuss patient referrals with the medical director before completing referral request forms cannot be considered an adverse employment action. Reply at 3-4. However, Morong contends that a reduction in his allowed vacation was the adverse employment action, not the directive that preceded it.

Finally, PHS asserts that "Morong simply fails to refute PHS' evidence that his time sheets were altered for no motive other than to reflect accurately the amount of time Morong was at work . . . . These changes did not affect Morong's pay." Reply at 5-6 (citation omitted). Morong is not required to "refute" any evidence at this stage of the proceedings; he is merely required to show that a dispute exists with respect to a material fact. Whether Morong's pay was affected by Harmon's alteration of his time sheets is very much in dispute. Plaintiffs' Responsive SMF ¶ 44. Whether the alterations accurately reflected the amount of time Morong actually worked is also very much in dispute. *Id*. ¶¶ 41-44.

Morong has established the second element of the test for a *prima facie* claim of retaliation under the Maine whistleblower statute with respect to the three events discussed above.

iii. Causal Connection

The plaintiffs must submit evidence that would allow a reasonable factfinder to conclude that the alleged adverse employment actions determined to be cognizable were causally linked to activity protected by the Maine whistleblower statute. The parties devote little attention to this element of the claims. PHS merely asserts that the "Plaintiffs cannot demonstrate that . . . the incidents that they assert constitute [adverse employment action] bear any causal nexus to the reports/complaints Plaintiffs allegedly made," Motion at 8 (emphasis deleted); that "Morong cannot establish a precipitating event that caused PHS to retaliate against him by reducing his vacation and salary and altering his time sheets," Reply at 4; and that the "Plaintiffs have not provided factual support for . . . their claim that [the alleged failure to pay Sherwood for extra hours worked] was the result of retaliatory animus," Reply at 6.

The plaintiffs' only response is that the remaining alleged adverse employment actions "followed closely on the heels of the refusals by Mr. Morong and Mr. Sherwood to comply with the directive not to document their requests for treatment of patients." Opposition at 16. However, this refusal cannot

reasonably be construed as a "report" to the employer under 26 M.R.S.A. § 833(1)(B). The plaintiffs do not articulate any basis for such a construction. The parties' statements of material facts present the following undisputed evidence on this point:

At times it would be necessary for PHS health care providers to refer inmates to outside health care providers or specialists for treatment. Defendants' SMF ¶ 50; Plaintiffs' Responsive SMF ¶ 50. PHS required health care providers to complete a written "Outpatient Referral Request Form" in order to refer inmates to outside health care providers. *Id*. The requests for outside referrals had to be approved by the PHS medical director. *Id*. Dr. Englander was responsible for overseeing requests for referrals by Morong and Sherwood. *Id*. ¶¶ 50, 189. During the course of their employment with PHS, Morong and Sherwood made frequent requests to refer inmates to outside consultants or health care providers, a number of which were ultimately rejected by Dr. Englander or the physician who was medical director at the time. *Id*. ¶¶ 51, 191. Because the numerous requests by Morong generated unnecessary work for PHS nursing staff, and because of the conflict his unapproved requests created with inmates, Murphy asked Morong to consult with Dr. Englander before completing the Outpatient Referral Request forms. *Id*. ¶ 53. Sherwood claims that he complained about his supervising physician's routine denial of his requests to refer inmates to outside providers for treatment to a supervisory employee of PHS, an employee of the State of Maine, the superintendent of a corrections facility, and an assistant attorney general in June 2000. *Id*. ¶ 191.

The following disputed evidence is presented on this point: Murphy advised Morong that if he was concerned about documenting the recommendations he made regarding treatment of inmates, he could note in the progress notes that he had discussed the matter with his supervising physician. *Id*. ¶ 54. This procedure did not bar Morong from filling out referral requests. *Id*. ¶ 55. Morong refused to discuss his views regarding the need for outside medical consultation or treatment with Dr. Englander before completing

the referral request forms. *Id*. ¶ 56. Murphy documented this refusal in a memorandum to Harmon dated March 30, 2001. *Id*. ¶ 57.

None of this evidence establishes that Sherwood "refused to comply" with Harmon's directive that he and Morong consult Dr. Englander before filling out the forms. However, the evidence does suggest that Sherwood's "reports" to outside providers to PHS or a public body about denials of his requests for referrals might, with the benefit of the drawing of favorable inferences, be characterized as concerning what Sherwood had reasonable cause to believe was a practice that would put at risk the health or safety of the inmates involved. But these reports occurred in June 2000; the alleged failure to pay Sherwood for overtime occurred in January through March 2001. "A substantial time lapse between the protected activity and the adverse employment action is counter-evidence of any causal connection." *Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 399 (7th Cir. 1999) (citation omitted) (lapse of four months; no causal connection). Here, the lapse was over a year. *See generally Smith v. Bath Iron Works Corp.*, 943 F.2d 164, 167 (1st Cir. 1991) (six month delay between harassing activity and resignation; no constructive discharge). Sherwood has failed to establish a causal connection and PHS is entitled to summary judgment on his claims in Count I.

With respect to Morong, there is no evidence that his refusal to consult with Dr. Englander before filling out a form requesting referral of an inmate to an outside health care provider could reasonably be considered, even with the benefit of favorable inferences, to constitute a report to PHS that he had reasonable cause to believe that requiring such consultation would create any risk to the health or safety of inmates. In the absence of any suggestion that such consultation would result in fewer actual referrals, no such conclusion may be drawn.

Morong has failed to demonstrate the necessary causal connection, and accordingly PHS is entitled to summary judgment on the claims he asserts in Count I.

2. Defamation. Count II of the complaint alleges that the defendants published defamatory statements about the plaintiffs without any privilege to do so. Complaint ¶¶ 61-68. In response to the defendants' contention that the plaintiffs had offered no admissible evidence of such statements, Motion at 27-30, the plaintiffs point to statements allegedly made by Harmon and Dr. Englander during "meetings between PHS and representatives of the Maine Department of Corrections," Opposition at 24; Plaintiffs' SMF ¶¶ 328-34, and an alleged statement by John Thompson, a PHS employee, to Russell Kelly, Opposition at 25 n.13; Defendants' SMF ¶ 227; Plaintiffs' Responsive SMF ¶ 227.

> Under Maine law, defamation requires (1) the unprivileged publication of a false statement tending to harm the reputation of the person about whom it is spoken; (2) fault amounting at least to negligence on the part of the speaker; and (3) special harm caused by the publication, or a statement that is actionable regardless of special harm.

Smith v. Heritage Salmon, Inc., 180 F. Supp.2d 208, 221 (D. Me. 2002) (citation omitted).

The specific statements at issue are the following:

> (i) John Thompson, a PHS employee, told Russell Kelly, a guard at the Maine Correctional Center, that Sherwood was "let go" for some reason having to do with "medical procedures and the way medical issues were handled and narcotics were handled and similar medications." Defendants' SMF ¶ 227; Plaintiffs' Responsive SMF ¶ 227.
>
> (ii) Harmon and Dr. Englander told state officials that Morong and Sherwood were to blame for complaints filed by prison inmates, that they were responsible for any lapse in medical care, and that they were terminated to correct the situation. Plaintiffs' SMF ¶ 331.
>
> (iii) Dr. Englander called Sherwood a "crybaby" who "refused to see patients." *Id*. ¶ 332.
>
> (iv) Harmon stated that Sherwood and Morong had been fired. *Id*. ¶ 333.

(v) Harmon and Dr. Englander said that "Now that they [Morong and Sherwood] are gone, things will be better." *Id*. ¶ 334.

The defendants dispute each of these assertions. Defendants' SMF ¶ 227; Defendants' Responsive SMF ¶¶ 331-34.

The defendants contend that "most of the alleged statements were either true or constitute opinions." Reply at 9. True statements and statements of opinion are not actionable. *Caron v. Bangor Publ. Co.*, 470 A.2d 782, 784 (Me. 1984). The defendants assert that the plaintiffs "were indeed the subject of numerous prison inmate complaints," citing Plaintiffs' Responsive SMF ¶ 119. Reply at 9. The plaintiffs' response to paragraph 119 of the defendants' statement of material facts merely admits that paragraph, which states: "During approximately September and October of 2000, five complaints by inmates were filed against Sherwood with the Maine Board of Licensure in Medicine. Each complaint concerned the discontinuation of medications." Defendants' SMF ¶ 119. This statement does not concern Morong at all; in addition, it does not address the assertion that both Morong and Sherwood "were to blame" for all complaints filed by prison inmates. It does not establish that the portion of the alleged defamatory statement at issue was in fact true. This is the only allegedly defamatory statement as to which the defendants provide a specific argument based on truth.

The defendants assert that the alleged statements that Sherwood was a "crybaby" and refused to see patients and that things would improve because Sherwood and Morong were gone were statements of opinion. Reply at 9. I agree that the latter statement expresses an opinion and is not actionable. I also agree that the assertion that Sherwood was a "crybaby" is an expression of opinion, but the statement that Sherwood refused to see patients is not. That portion of the alleged statement remains actionable.

The defendants argue that the remaining alleged statements are privileged. Motion at 30; Reply at 7-8.

> Maine's Law Court has generally adopted the Restatement (Second) of Torts ("Restatement") in its development of common law defamation. *See, e.g.*, *Staples v. Bangor Hydro-Elec. Co.*, 629 A.2d 601, 604 (Me. 1991). The applicable provision here is § 598:
>
> > An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
> > (a) there is information that affects a sufficiently important public interest, and
> > (b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true.

Baker v. Charles, 919 F. Supp. 41, 44 (D. Me. 1996). In this case, Kelly has not been shown to be a person who was authorized or privileged to take action on Thompson's alleged remark, and the defendants make no privilege argument with respect to that statement. The motion for summary judgment must accordingly be denied as to that statement. With respect to the remarks attributed to Harmon and Dr. Englander which are not expressions of opinion, the statements were made to three representatives of the state department of corrections, Plaintiffs' SMF ¶ 330; Defendants' Responsive SMF ¶ 330, who may reasonably be characterized as "public officers," but the allegedly defamatory remarks would not authorize them to take any action. Morong and Sherwood had already resigned by the time the remarks were allegedly made. Reply at 8. The Department of Corrections could not take any action against them, nor as a practical matter could it take action against PHS under the circumstances. Under the Restatement, therefore, the alleged remarks were not privileged.

Out of an abundance of caution, because the Maine Law Court has sometimes applied the conditional privilege in the context of defamation without mentioning the requirement that the communication

be made to someone who is authorized or privileged to act on the information conveyed, if true, *see, e.g.*, *Gautschi v. Maisel*, 565 A.2d 1009, 1011 (Me. 1989); *Cole v. Chandler*, 752 A.2d 1189, 1193 (Me. 2000), I will address one further matter. When a conditional privilege exists, "liability for defamation attaches only if the person who made the defamatory statements loses the privilege through abusing it." *Lester v. Powers*, 596 A.3d 65, 69 (Me. 1991). "Such an abuse occurs when the person either knows the statement to be false or recklessly disregards its truth or falsity." *Id*. The defendants contend that the plaintiffs cannot show that the privilege was abused because "[t]hey rely on generalized statements in the Purrington Affidavit, and do not provide specific content, the context in which the statements were made, or the time, date and place of the meeting." Reply at 8. None of these factors affects the question whether the privilege was abused. To the extent that they may be considered in this context at all, I conclude that the plaintiffs have provided sufficient evidence of the content of the statements, the context in which they were made and the approximate time when they were made. With respect to one of the alleged statements, that Morong and Sherwood were fired, the defendants admit that they knew such a statement was false: "those who attended the meeting knew that the Plaintiffs resigned voluntarily and were not terminated." Reply at 8. A reasonable factfinder could conclude from the evidence in the summary judgment record that a statement that Morong and Sherwood were responsible for any lapses in medical care that occurred while they were employed by PHS was made in reckless disregard of its truth or falsity. There is sufficient evidence of abuse of any conditional privilege that may have existed to prevent the entry of summary judgment for the defendants on this issue on this basis. *See generally Rippett v. Bemis*, 672 A.2d 82, 85 (Me. 1996).

To the extent that the defendants continue to press their contention that "Plaintiffs cannot demonstrate that PHS was negligent as required by Maine law," Motion at 30, the evidence in the summary

judgment record would allow a reasonable factfinder to conclude that the defendants were negligent in making the alleged statements.

The defendants do not contend that the allegedly false statements at issue would not tend to harm the reputations of Morong or Sherwood, nor could they do so. The final element of the defamation claim, that harm be caused by the publication or that the statement be actionable regardless of special harm, is met in this case because the alleged statements, if made, were directed specifically at the plaintiffs' performance of their profession and ascribed to them characteristics so essential to their profession that they had the potential to undermine their ability to pursue that profession. *Marston v. Newavom*, 629 A.2d 587, 592 (Me. 1993). Again, the defendants make no argument on this point.

The defendants are not entitled to summary judgment on Count II.

3. Negligent Misrepresentation. Count III alleges negligent misrepresentation against PHS alone in connection with the filing of license and registration applications with the Maine Board of Medicine. Complaint ¶¶ 69-77. PHS contends that the plaintiffs have not presented sufficient evidence to allow them to proceed on this claim. Motion at 34-36. The plaintiffs assert that they base this claim on "PHS' repeated false statements that it had performed the steps necessary for Mr. Morong and Mr. Sherwood to practice as physician assistants." Opposition at 26 (emphasis omitted).

The Maine Law Court has adopted section 552(1) of the Restatement (Second) of Torts with respect to the tort of negligent misrepresentation, which provides, in relevant part:

> One who, in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Chapman v. Rideout, 568 A.2d 829, 830 (Me. 1990). PHS points out, correctly, that the plaintiffs have offered no evidence that they sustained any pecuniary loss as a result of their reliance on PHS's assurances that the paperwork had been properly filed with the appropriate state agency. Motion at 35. The plaintiffs do not respond to this argument, asserting only that the filing of the resulting complaints against them by the Board of Licensure in Medicine adversely affected their reputations in the medical community. Opposition at 26 n.14. This is not sufficient to state a claim for negligent misrepresentation under Maine law. PHS is entitled to summary judgment on Count III.

4. Fraud. Count IV of the complaint alleges fraud in connection with the same events that form the basis of Count III. Complaint ¶¶ 78-82. This claim is asserted only against PHS, which contends that the plaintiffs cannot meet their burden of establishing several of the elements of this cause of action. Motion at 31-33.

Under Maine law,

> [t]o withstand [a] motion for summary judgment on [a] fraud claim[], plaintiffs must demonstrate specific facts that create a dispute as to whether defendants made a misrepresentation of material fact, with knowledge of its falsity or in reckless disregard of whether it was true or false and as to whether they reasonably relied on the misrepresentations to their detriment. Plaintiffs must produce evidence that demonstrates that the existence of each element of fraud is "highly probable" rather than merely likely.

Barnes v. Zappia, 658 A.2d 1086, 1089 (Me. 1995) (citations omitted). PHS asserts that the plaintiffs "cannot meet the heavy burden of establishing that PHS intentionally failed to file the requisite paperwork with the Board of Licensure in Medicine," Motion at 31, but that is not the basis of the plaintiffs' claim. That claim is based on the statements of one or more PHS employees to the plaintiffs "that it had performed the steps necessary for Mr. Morong and Mr. Sherwood to practice as physician assistants." Opposition at 26.

PHS argues that the plaintiffs had "the ultimate responsibility to ensure that [their] plan[s] of supervision [were] filed with the licensing Board" under applicable regulations and that they therefore cannot argue that their reliance on PHS's representations that all necessary paperwork had been filed on their behalf was reasonable. Motion at 33. This argument essentially presents the contributory negligence defense rejected by the Maine Law Court in *Letellier v. Small*, 400 A.2d 371, 373-75 (Me. 1979). A reasonable factfinder could determine by clear and convincing evidence that the plaintiffs' reliance was reasonable under the circumstances.

PHS next contends that there is no evidence that it intended that the plaintiffs rely on the representations at issue. Motion at 33. To the contrary, the plaintiffs have submitted clear and convincing evidence from which a reasonable factfinder could infer such intent. Plaintiffs' Responsive SMF ¶ 136. This means only that a jury could find that PHS intended that the plaintiffs rely on its representations that the necessary registration paperwork had been properly filed; it does not mean, as the plaintiffs contend, that "PHS would intentionally create a licensing problem for seven of its employees . . . particularly in light of the difficulties it had getting appropriate staffing and then offer to pay for an attorney to rectify the situation." Motion at 33. Similarly, it does not mean that the representations were knowingly false at the time they were made. Rather, it means that a reasonable jury could find that PHS recklessly disregarded whether the representations were true or false in light of the plaintiffs' "numerous" requests that PHS "verify the status of their applications and . . . confirm the identity of their supervising physician." Plaintiffs' Responsive SMF ¶ 136.

Finally, PHS asserts that the plaintiffs were not damaged by the alleged fraud because the resulting complaint was dismissed by the Board of Licensure in Medicine and because "they have produced no evidence of damage to their reputations." Motion at 33. The plaintiffs do not respond to this argument. I

agree that the plaintiffs have not proffered clear and convincing evidence of damage to their professional reputations.[6] The plaintiffs have also failed to submit any evidence that would allow a factfinder to conclude that they incurred any financial expense in connection with the Board proceeding.[7] Maine law requires that the damage element of a claim of fraud consist of pecuniary damages. *Jourdain v. Dineen*, 527 A.2d 1304, 1307 (Me. 1987). Accordingly, the plaintiffs have not presented evidence of damages resulting from the alleged fraud, and the defendants are entitled to summary judgment on Count IV.

5. Negligence. In Count V, the plaintiffs allege that both defendants breached a duty to them to "exercise reasonable care in providing medical resources and personnel insofar as necessary to enable Mr. Morong and Mr. Sherwood to practice in a manner consistent with their professional obligations and to satisfy applicable standards of medical care." Complaint ¶ 84. The defendants contend that they owed no such duty to the plaintiffs. Motion at 36-41. The plaintiffs point out in response that their negligence claim includes an allegation that PHS "undertook and breached the duty to properly register Mr. Morong and Mr. Sherwood as physician assistants." Opposition at 27 n. 16. The complaint may fairly be read to include such an allegation. Complaint ¶¶ 83-89. However, the plaintiffs cite no authority in support of their contention that both duties exist at common law. Opposition at 28. In addition, the plaintiffs have provided no evidence that Dr. Englander had the power to provide "medical resources and personnel" to support them, and they express their claim with respect to registration as one asserted only against PHS. Dr. Englander is accordingly entitled to summary judgment on this count.

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[6] The plaintiffs have provided only a general assertion to the effect that "[c]omplaints filed against a physician assistant with the Board of Licensure in Medicine adversely affect the reputation of the physician assistants [sic] in the medical community regardless of whether any adverse action is taken against the physician assistant," Plaintiffs' Responsive SMF ¶ 75, supported by a citation to a deposition that is not part of the summary judgment record.

[7] The plaintiffs provide evidence only that the attorney retained by PHS to represent them before the board did not do so "due to concerns that there was a conflict of interest." Plaintiffs' Responsive SMF ¶ 138.

The Maine Law Court has not recognized the duties alleged by the plaintiffs to exist with respect to this count. The plaintiffs alleged that PHS's duty to register them properly was "undertaken" rather than imposed by law. The plaintiffs' cause of action in this instance would thus be one for breach of contract rather than the tort of negligence. With respect to the other alleged duty, the plaintiffs have failed to establish the elements of such a claim.

The elements of a claim of negligence are (i) a duty owed the plaintiff by the defendant, (ii) the defendant's breach of that duty, and (iii) injury of the plaintiff by that breach. *Parker v. Harriman*, 516 A.2d 549, 550 (Me. 1986). "Whether one party owes a duty of care to another is a matter of law." *Joy v. Eastern Maine Med. Ctr.*, 529 A.2d 1364, 1365 (Me. 1987). In the absence of citation to authority in any jurisdiction adopting as a matter of law the duty on which the plaintiffs rely, this court is not the appropriate forum in which to create such a duty for Maine. PHS is also entitled to summary judgment on Count V.

6. Breach of Contract. Count VI is asserted against PHS alone and alleges that it breached contracts with each of the plaintiffs. Complaint ¶¶ 90-95. PHS contends that the plaintiffs were employees at will and accordingly may not assert breach-of-contract claims. Motion at 41-42. The plaintiffs argue in response that PHS "impliedly promised that it would provide the resources and operations necessary" and assert in conclusory fashion that "[t]he employment-at-will doctrine does not negate traditional principles of . . . contract law." Opposition at 28-29. The plaintiffs apparently concede that they did not have written employment contracts; neither statement of material facts offers evidence of any such documents. The parties' arguments proceed on the assumption that the plaintiffs were employees at will.

That assumption severely undermines the plaintiffs' reliance on the only case law they cite, *Top of the Track Assocs. v. Lewiston Raceways, Inc.*, 654 A.2d 1293 (Me. 1995). Opposition at 28. In that

case, the Maine Law Court did recognize that implied provisions may exist in a contract when such provisions are indispensable to effectuate the intention of the parties "and as arise from the language of the contract and the circumstances under which it was made." 654 A.2d at 1295 (citation omitted). However, in that case there was an underlying written lease. *Id*. There is no written contract in this case, and, unlike the situation in *Top of the Track*, this case concerns an employment relationship rather than an agreement between two businesses. The Maine Law Court has "consistently refused to recognize implied promises in employment contracts of indefinite duration." *Bard v. Bath Iron Works Corp*., 590 A.2d 152, 156 (Me. 1991). This explicit provision of Maine common law applies to the facts presented here. PHS is entitled to summary judgment on the plaintiffs' breach-of-contract claims.

7. Statutory violation. Count VII is asserted against PHS alone and alleges violation of 26 M.R.S.A. § 626. PHS contends that the plaintiffs have no claim under section 626 because they "have conceded that PHS paid them their final wages after they resigned from their employment." Motion at 42. The statute at issue provides, in pertinent part:

> An employee leaving employment must be paid in full within a reasonable time after demand at the office of the employer where payrolls are kept and wages are paid . . . . Whenever the terms of employment include provisions for paid vacations, vacation pay on cessation of employment has the same status as wages earned.
>
> * * *
>
> For purposes of this subchapter, a reasonable time means the earlier of either the next day on which employees would regularly be paid or a day not more than 2 weeks after the day on which the demand is made.

26 M.R.S.A. § 626. The plaintiffs assert that PHS failed to pay Morong for two weeks' vacation and by converting time he had recorded as actually worked to paid time off or vacation time, took away unspecified earned wages and employment benefits and that Sherwood did not receive additional compensation for work during the period from January through March 2001. Opposition at 29.

PHS cites a paragraph of its statement of material facts to the effect that Sherwood was paid all wages that were due following his resignation, Motion at 42, but that paragraph is denied by the plaintiffs, Defendants' SMF ¶ 174, Plaintiffs' Responsive SMF ¶ 174. PHS next asserts that "there is no evidence to support this claim," Motion at 42, but as discussed above in connection with the plaintiffs' constructive discharge claim, there is evidence, albeit disputed, from which a reasonable factfinder could conclude that Sherwood was not paid what he was entitled to be paid for the period in question. The challenges previously raised by PHS went to the weight of this evidence, a matter not considered in connection with summary judgment, and PHS offers no new reason here to disregard that evidence. PHS is not entitled to summary judgment on Sherwood's section 626 claim on the showing made.

PHS also reiterates its earlier arguments concerning Morong's claims. Motion at 43. None of the paragraphs of its statement of material facts cited by PHS establishes that Morong is not entitled to the money he claims.[8] On the showing made, PHS is not entitled to summary judgment on Morong's section 626 claim.

8. Punitive damages. The plaintiffs seek punitive damages in Counts I and IV. Complaint at 10, 14. If the court adopts my recommendation that summary judgment enter against them on both of these counts, no claim for punitive damages will remain in the case. I note that the plaintiffs did not respond to the defendants' argument that they are not entitled to punitive damages on these claims in any event. Under the circumstances, I do not reach that alternative argument.

III. Conclusion

For the foregoing reasons:

[8] Contrary to PHS's representation, Motion at 43, paragraph 45 of its statement of material facts cannot reasonably be (*continued on next page*)

A. The plaintiffs' first motion to strike (Docket No. 21) is **GRANTED** as to paragraphs 12 (the phrase "and complete 'on call' coverage" in the first sentence only), 21 (second sentence only), 32, 40, 49, 53 (second sentence only), 57 (only that portion of the second sentence that refers to Murphy's view of Morong's refusal), 61 (the following portions only: "PHS did not provide services at that facility and" and "and she did not have time to supervise him there"), 62, 64-65, 67, 70, 85, 87, 88 (first sentence only), 106, 110 (second sentence only), 123 (first sentence only), 124, 130, 142 (only the phrase "that they did not like the way Mr. Sherwood treated them"), 146, 147 (everything but the words "Sherwood had overridden an order Dr. Englander had placed in an inmate's chart, and made an editorial comment in the patient's chart that Dr. Englander had not seen the patient"), 149, 196-97 (only as to the words "and equipment"), 201 and 235 (only that portion that follows the word "staff") of the defendants' statement of material facts and otherwise **DENIED.**

B. The defendants' first motion to strike (Docket No. 27) is **GRANTED** as to the following paragraphs of the affidavit of Deborah Purrington (Docket No. 18) and the corresponding paragraphs of the plaintiffs' statement of additional material facts (included in Docket No. 15) and otherwise **DENIED**: paragraph 18 (first, third and fourth sentences) of the affidavit and paragraphs 280 and 282 of the statement of additional material facts; paragraph 21(first sentence) of the affidavit and paragraph 290 of the statement of additional material facts; paragraph 26 (first sentence only) of the affidavit and paragraph 307 of the statement of additional material facts; paragraph 33 (first and third sentences) of the affidavit and paragraphs 335 and 337 of the statement of additional material facts; paragraph 34(first sentence only) and paragraph

read to support the assertion that "no inappropriate or unlawful deductions were taken from [Morong's] salary," Defendants' SMF ¶ 45.

338 of the statement of additional material facts; paragraph 35 of the affidavit and paragraph 344 of the statement of additional material facts.

C. The defendants' second motion to strike (Docket No. 28) is **DENIED**.

D. The plaintiffs' second motion to strike (Docket No. 32) is **DENIED**.

E. I recommend that the defendants' motion for summary judgment (Docket No. 9) be **GRANTED** as to Counts I and III-VI and any claims for punitive damages and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 10th day of December 2003.

_____
David M. Cohen
United States Magistrate Judge

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V.

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